POSSESSION.

I. *The Idea of Possession.*

TO possess is to have absolute power of dealing with the thing oneself and absolute power of excluding the action of everybody else. This condition, so far as actually established, may be a consequence of physical strength, as when the tiger in the zoo guards the raw meat between his paws, or of physical barriers, as when one locks up his valuables against thieves or fortifies a city against an enemy, or of concealment, as when the thing possessed is hidden in order that no one else may deal with it, or of superior agility, as when a dog runs away with a glove, — or it may depend wholly, so far as power to exclude the action of others is concerned, upon a deference to the will of the possessor imposed by habit, the moral sentiment, religion, or law.

Mr. Justice Holmes supposes the case of "a powerful ruffian within equal reach and sight when a child picks up a pocketbook."[1] Which of the two has possession? Sir Frederick Pollock says the child has. He may contravene the ruffian as by tearing the book or throwing it over a cliff.[2] I conceive the answer to be that the child has possession so far as his will has power to exclude the action of others, and the ruffian has possession so far as *his* will has power to exclude the action of others. As against the ruffian, the child's will, notwithstanding Sir Frederick's suggestions, probably would not give much protection, but, as against every one else, energized by moral sentiment and the commands of positive law, it might be as potent as Richelieu's "awful circle of the church" in Bulwer's play.

Possession is limited, of course, to the thing possessed, but in other respects the idea of possession is the intoxicating one of absolute and unlimited dominion. It is a simple idea. But it is also a highly abstract idea never perfectly realized except in imagination. Attempts are often made to define actual possession. The appearance of power to exclude is sometimes made the test.

When we speak of a power to exclude others," says Mr. Justice

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[1] Holmes, Common Law 235.

[2] Pollock and Wright on Possession 15.

Holmes, "we mean no more than a power to exclude which so appears in its manifestation. A powerful ruffian may be within equal reach and sight when a child picks up a pocket-book; but if he does nothing the child has manifested the needful power as well as if it had been backed by a hundred policemen."[1] "In common speech," says Sir Frederick Pollock, "a man is said to be in possession of anything of which he has the apparent control or from the use of which he has the apparent power of excluding others."[2] And one Zachariae, cited in Savigny's notes, says, "Possession is that relation between a subject matter and man which *intimates* that the man has the *animus domini* and that he is also able to put it into execution."[3] Savigny disputes this, and says the mere appearance of power cannot give possession. He makes possession depend on consciousness of physical power. The possessor must have enough power to give rise to the consciousness of unlimited power. "Every case of possession," he says, "is founded on the state of consciousness of unlimited physical power. To create this feeling the desire to have the subject as one's own must exist; and, at the same time, the physical requisites of power which are capable of giving rise to this consciousness."[4]

De facto possession, according to Sir Frederick Pollock, is effective occupation or control. "It is evident," he says, "that exclusive occupation or control in the sense of a real unqualified power to exclude others is nowhere to be found. All physical security is finite and qualified. A strong man is worse to meddle with than a weak man or a child, but the strong man also may be overpowered. . . . Locks may be picked, bolts forced, walls broken. . . . The amount of material difficulty which it is necessary or worth while to set up is found by experience to vary with the circumstances. A dwelling-house is not built or guarded like a prison, and we do not lock up tea and candles in a safe; we should call a banker imprudent who exercised only the same cautions as a private householder. We may say, then, that, in common understanding, that occupation at any rate is effective which is sufficient as a rule and for practical purposes to exclude strangers from interfering with the occupier's use and enjoyment."[5]

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[1] Holmes, Common Law 234, 235.
[2] Pollock and Wright on Possession 1.
[3] Perry, Savigny on Possession 73 g.
[4] *Ibid.* 170, 171.
[5] Pollock and Wright on Possession 12, 13.

Attempts to define actual possession are, I think, necessarily futile. "To define possession," says Bentham, "is to recall the image which presents itself to the mind when it is necessary to decide between two parties, which is in possession of a thing and which is not. But if this image is different with different men — if many do not form any image, or if they form a different one on different occasions — how shall a definition be found to fix an image so uncertain and variable?"[1] So might one despair of finding a definition of cold by looking for the degree of temperature which people agree to call cold. The relation of fact to idea in the case of possession is the same as in the case of the geometric conceptions, and trying to say when there is possession is like trying to say whether a thing is or is not round. Imagine Archimedes offering this definition: A thing is round when it is so nearly round one is not conscious it is not round. Or discussing the sphere after this fashion: *Elements of de facto roundness.* A thing is round when it is round enough. A ping-pong ball is not absolutely round, and yet every one will say it is round, — at least until he stops to think about it. On the other hand no one would call a billiard-ball with the contour of a ping-pong ball round. Absolute roundness is nowhere to be found. What is necessary to actual roundness depends on circumstances. Balls on the ping-pong model would not serve for billiards, but they do for ping-pong. We may say that in common understanding a thing is round when it is round enough for practical purposes.

II. *Technical Conditions of Legal Possession.*

The technical conditions of legal possession are subject to no limit of variation. I may be denied the *jus possessionis* for lack of some manifestation of will or I may not. A customer standing at a counter and examining a watch may not have legal possession of it until he has in some way appropriated it. On the other hand the legal possession of an ancestor now passes on his death to his heir. No entry is required on the part of the heir. The owner of sheep and cattle acquires possession of their increase — milk and wool, lambs and calves — without act on his part. And without act on my part I gain possession of soil added to my field by the current of a river, and of the tree which strikes its roots into my ground.

[1] Perry, Savigny on Possession viii.

Continuance of control may or may not be necessary to continuance of legal possession. To gain possession of wild animals I must capture them, and when I lose control of them I lose possession. As a general rule, however, under the common law, loss of power of dealing with the thing does not entail loss of legal possession.

To gain possession by occupation or exercise of right of entry involves sometimes not much more than a mere manifestation of will to exclude. "Where a man . . . was out of seisin," says Sir Frederick Pollock, "but had a right of entry, his entry into any part of the land gave him seisin of all the land in the same county which, if put to his action, he could have recovered in the same action, provided that the entry was made in the name of the whole."[1]

Doing something on or by or near the thing may be made a condition of legal possession. The law for instance may require livery of seisin to take place on the land. "*Clavibus traditis*," says the Digest, "*ita mercium in horreis conditarum possessio tradita videtur, si claves apud horrea traditae sint, quo facto confestim emtor dominium et possessionem adipiscitur, etsi non aperuerit horrea.*"[2] That is to say, if I wish to give possession of goods by delivery of the key of the warehouse in which they are, I must deliver it at the warehouse. But although I may have to go to the warehouse to get legal possession, it does not follow that I must stay there to keep it.

To acquire legal possession of a thing already possessed it may be necessary to get the better of its possessor in some way. If a thief wishes legal possession of my watch, a mere "warning off" will not avail him as it would the discoverer of an islet in the South Sea. Neither will an unsuccessful struggle for it. He must in some way "ease him of his adversary."

If I am entitled to immediate legal possession of land legally possessed by another, I may acquire it under the common law by an entry on the premises in his absence, accompanied by some distinct manifestation of my will to shut him out. "Where one has a right to enter into a house," says Sir Frederick Pollock, "entry into any part of the house even with part of one's body suffices."[3] A mortgagee entitled to possession of a house entered

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[1] Pollock and Wright on Possession 78.
[2] Perry, Savigny on Possession 159.
[3] Pollock and Wright on Possession 78, 79.

the house, took off the lock of the outer door, and was engaged in putting on a new lock when the mortgagor's tenants appeared on the scene and drove him away. It was held that he had gained possession before he was ejected, and consequently could not be said to have had no ground for alleging a forcible entry on the part of his ejectors.[1] But an entry without right on the land of another will not give me legal possession if accompanied merely by manifestations of my will. Subjection to my will must also be apparent as a fact of the case. If the owner *submits* to my will to exclude him, that may be enough. "A man who is not entitled to take possession," says Mellish, L. J., "can obtain possession only of that which he actually lays hold of."[2] "*Si cum magna vi ingressus est exercitus*," says the Digest, "*eam tantummodo partem quam intraverit obtinet.*"[3] I am not deemed to have "laid hold of" or to have "entered" a piece of land within the meaning of these propositions until actual subjection to my will to exclude from every part of it has in some way been made manifest.

Whether any manifestation of superior strength unaccompanied by submission, will nowadays give legal possession of another's land is extremely doubtful. Under the Roman law I might enter on another's land with an army and surround it with fortifications, but he was not dispossessed until he knew of my occupation.[4] If after learning of my entry he did not promptly attempt to drive me off, or attempted to eject me and was beaten off, then and not till then he lost his right of possession.[5] The rule that an appropriator's superior strength shall not of itself give legal possession is a reasonable one, for it would be difficult to say when such superiority existed. How high and how strong must the fences be, how complicated the locks, how numerous the guards which would serve to dispossess an owner? Such questions would be difficult to answer. But if two meet in combat and one is defeated, or one man knowing that another has appropriated his land stands by for a space of time and does nothing, we have something definite to serve as a basis of a rule.

Trial by wager of battle has gone out of fashion. In the time of Bracton, according to Mr. Maitland, the very act of casting out an owner gave the disseisor legal protection against strangers.[6]

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1 Pollock and Wright on Possession 79.
2 *In re* Fletcher, 5 Ch. D. 809, 813.
3 Perry, Savigny on Possession 264.
4 *Ibid.* 151, 248, 261.
5 *Ibid.* 262, 263.
6 4 Law Quart. Rev. 33.

But this is probably not the modern law. "A trespasser," says Sir Frederick Pollock, "does not gain possession until there has been something like acquiescence in the physical fact of his occupation on the part of the rightful owner."[1] It is one thing to be beaten and another to give up, and whatever effect modern law may give to mere mastery, the ordinary condition of acquisition of legal possession of land against the will of owners is the exhibition, as a fact of the particular case, of dominion and submission, or adverse possession, a relation to be carefully distinguished from possession *ex consensu* and legal possession. The submission of an owner to an adverse will which will eventually extinguish his right to possess deprives him in the beginning of his right of possession and gives it to his adversary. And the submission of others to the adverse will of an appropriator may give him legal possession of a thing already possessed by one who does not submit, and consequently, if double possession is to be deemed impossible, make him sole possessor.

The facts we think of as constituting adverse possession are significant as evidencing will to exclude and submission to such will. Dealings with land not significant of will to exclude do not give the *jus possessionis*. Farming a piece of land, for instance, is significant, generally speaking, of will to exclude others from dealing with it, but if the surface of the ground and mines beneath it were held by different owners, the farmer's cultivation of the surface would not indicate an intention to exclude the mine owner from his mines, and therefore would not operate to put an end to his possession of them. Again, the dealings of a tenant in common with land held by him are not taken to manifest will to exclude his co-tenant, and therefore do not operate to determine his co-tenant's possession.[2]

Moreover the facts evidencing adverse possession must not only evidence will to exclude, but submission thereto. Sowing a crop and tilling it without molestation would be good evidence of adverse possession of a field in the country, but it would be little or no evidence of adverse possession of a vacant lot in the lower part of Manhattan. Proof of sowing and tilling without molestation in the latter case would be taken to show nothing but indifference or *gratia* on the part of the owner. Using, without

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[1] Pollock on Torts, 6th ed., 371.

[2] See Pollock and Wright on Possession 86, 87.

disturbance, a vacant city lot as a place of deposit for building materials and refuse would also be very slight evidence of *patientia* on the part of the owner.[1]

One's submission to will cannot be inferred from acts of which he has no knowledge. Therefore, if evidence of dealings with land goes to support a claim of possession, evidence (which may not always be admitted in the face of presumptions) that the claimant's adversary or adversaries knew nothing about them goes to defeat it. Lord Blackburn says, speaking of the conclusion as to possession to be drawn from acts of ownership, "No one such act is conclusive, and the weight of each act as evidence depends on the circumstances; one very important circumstance as to the weight being, whether the act was such and so done that those who were interested in disputing the ownership would be aware of it."[2]

To infer correctly dominion and submission from a succession of more or less equivocal acts of user is no easy matter. And if we accept the fact of dominion and submission so proved as a condition of legal possession, we are also obliged to consider what continuance of acts of user shall be deemed to show dominion and submission, and what continuance of dominion and submission shall be deemed to give legal possession, and we may say, I think, that there are no rules to help us to answer either of these questions. In deciding questions as to adverse possession, dealings with land are not commonly distinguished from the dominion and submission of which they are evidence. The question arises in ejectment as to whether the plaintiff has shown possession, and the conscience of the judge finds a certain period of undisturbed enjoyment (which is spoken of as actual possession) a sufficient basis for the *jus possessionis*. "One year's possession under a lease," says Sir Frederick Pollock, "has been held to be enough, though the lessor's title was not shown. Ten years' possession has been decisive even against several years' subsequent possession under colour of title."[3]

III. *Holmes on Possession.*

"Every right," says Mr. Justice Holmes, "is a consequence attached by the law to one or more facts which the law defines. . . . When a group of facts thus singled out by the law exists in

[1] See Pollock and Wright on Possession 86. [2] *Ibid.* 33. [3] *Ibid.* 96.

the case of a given person, he is said to be entitled to the corresponding rights. . . . The word 'possession' denotes such a group of facts. Hence, when we say a man has possession, we affirm directly that all the facts of a certain group are true of him, and we convey indirectly or by implication that the law will give him the advantage of the situation."[1] Here we have the beginning of an attempt to analyze possession after the ordinary fashion. Possession *ex consensu* is to be disregarded, and conclusions are to be reached by considering merely the technical conditions of the *jus possessionis*. In his discussion of the ground of liability for unintentional injuries Mr. Justice Holmes takes account of "facts of a special and peculiar function" whose "function is to suggest a rule of conduct."[2] In his analysis of possession he does not. And his oversight furnishes an illustration of his statement with reference to liability for unintentional injuries, that after rules based on habit and custom have been framed, "the grounds from which they spring cease to be manifest."[3]

I have defined adverse possession as a relation of dominion and submission. That is to say, I have supposed the fact of adverse possession to exist when A is manifesting his will that B shall keep off, and B is obeying him. Adverse possession, however, is commonly conceived as a manifestation of will and power to deal with the thing to the exclusion of others. According to this idea to make A an adverse possessor he must indeed be manifesting his will that B shall keep off, but B need not be obeying him. He may be merely holding B off by an exhibition of superior strength.[4] And A must not be merely excluding B from the thing. He must have some power of dealing with it himself.[5] Adverse possession, so conceived, may be termed, for the sake of distinguishing it from mere dominion and submission, corporeal adverse possession.

The theory of possession based on the Roman law, which is commonly accepted by civilians, makes the *jus possessionis* an accompaniment merely of corporeal adverse possession, beginning when corporeal adverse possession begins, and ceasing when corporeal adverse possession ceases.[6] The numerous German trea-

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[1] Holmes, Common Law 214. [2] *Ibid.* 150.
[3] *Ibid.* 145, 146.
[4] See Perry, Savigny on Possession 150, 151, 373, 374.
[5] *Ibid.* 121, 253, 254.
[6] *Ibid.* 27, 146, 147, 246, 366.

tises on possession are elaborate attempts to make this theory fit the facts. German theorists consider adverse possession a consequence of the possessor's power *ex propriis*. That is to say, A is not to be considered possessor merely because B is obeying him, but because A is making B obey him. They accept, however, the fact of obedience as manifesting power to compel it. If I order a man to lie down and he obeys, whatever my power may be, he has in fact submitted to my will. Of such a case the Germans say "the will has made itself actually valid."[1] If the will has made itself actually valid, whether by virtue of the possessor's superior strength or merely by virtue of his adversary's submission, that is enough.

Mr. Justice Holmes adopts the German theory of possession as true to a certain extent of the common law. He does not find the continuance of corporeal adverse possession necessary under our law to the continuance of legal possession,[2] but he finds something very close to corporeal adverse possession necessary to the acquisition of legal possession. As he expresses it, "To gain possession a man must stand in a certain physical relation to the object and to the rest of the world, and must have a certain intent."[3] These conditions he defines elsewhere more exactly as follows: A degree of power over the object is essential,[3] and there must also be an intent to exclude others[4] and a relation of manifested power to exclude others co-extensive with the intent to do so.[5] We have here all the elements of will and power to deal with the thing to the exclusion of others, except that of will to deal with the thing. One "must stand in a certain physical relation to the object," that is to say, he must have "a degree of power over it," some power of dealing with it. He must have an intent to exclude others. And he "must stand in a certain physical relation to the rest of the world," that is, there must be "a relation of manifested power" to exclude others "co-extensive with the intent" to do so, or, in other words, there must be an exhibition either of mastery or of dominion and submission. Mr. Justice Holmes, when he speaks of "a relation of manifested power co-extensive with the intent,"[3] adopts the German notion I have referred to of the will making itself actually valid. If A puts

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[1] Four German Jurists, 11 Pol. Sci. Quart. 282, 283.
[2] Holmes, Common Law 237.
[3] *Ibid.* 216.
[4] *Ibid.* 220.
[5] *Ibid.* 216, 234, 235.

B out we have a relation of manifested power co-extensive with the intent, and we have it also if B, whatever A's power may be, obeys A's order to get out.

Let us consider, first, Mr. Justice Holmes's assertion that there must be a relation of manifested power co-extensive with the intent, that is to say, that there must be an exhibition either of mastery or of dominion and submission. He refers to two cases where such an exhibition was required as a condition of legal possession. "Where two parties," he says, "neither having title, claimed a crop of corn adversely to each other, and cultivated it alternately, and the plaintiff gathered and threw it in small piles in the same field, where it lay for a week, and then each party simultaneously began to carry it away, it was held that the plaintiff had not gained possession. But if the first interference of the defendant had been after the gathering into piles the plaintiff would probably have recovered."[1] That is to say, an inference of submission to the plaintiff's will could have been drawn from the defendant's non-interference. Mr. Justice Holmes also cites Browne *v.* Dawson[2] as a case where the claimant of possession failed to show a manifestation of power co-extensive with his intent, — a case where it was found that the claimant's adversaries had neither submitted to his will nor been deprived of power to re-enter.

"A relation of manifested power co-extensive with the intent" is not always a condition of legal possession, however, and Mr. Justice Holmes has selected for illustration of his theory a case where he is wrong, I think, in supposing this condition to exist. "A powerful ruffian," he says, "may be within equal reach and sight when a child picks up a pocket-book; but if he does nothing the child has manifested the needful power as well as if it had been backed by a hundred policemen."[1] The finder of a lost pocket-book acquires possession by manifestation of his will. He is not obliged to "manifest power," that is to say, he is not obliged to get the better of any one or procure submission on the part of any one to his will. The respect paid his will by the particular persons to whom it happens to be made known is an immaterial fact. If the pocket-book had belonged to the ruffian, then indeed it would have been necessary to find submission to the child's will as a fact

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[1] Holmes, Common Law 235.

[2] 12 A. & E. 624; Holmes, Common Law 235.

of the particular case. Such submission might be inferred from his allowing the child to walk off with the pocket-book, but it would hardly be inferred from his allowing him to handle it in his presence. The child's moral power to exclude in the case supposed by Mr. Justice Holmes, arising from the fact that the average man would respect his will, is evidence of actual submission on the part of the ruffian, but it does not follow that his submission is a condition of the child's possession. Moral power to exclude may be a consequence of actual submission. If the owner of a piece of land actually submits to my will to appropriate it, the average man, it may be, will therefore leave me in peace. On the other hand, actual submission may be a consequence of moral power to exclude. I may obey an expression of will that I shall leave a pocket-book alone because the average man would obey such a command. In the first case legal possession is naturally a consequence of actual submission. In the second it is naturally a consequence of the custom of the average man whether any actual submission can be found in the particular case or not.

Neither can it be maintained that will to exclude is always a condition of legal possession, although no doubt it often is, as in cases of acquisition by occupancy. Legal possession passes to a devisee without act on his part. As a man's lessee I am legally empowered to exclude him and other people from the premises, but I need never have had nor have manifested any intention of doing so. A lessee does not receive legal possession because of his intent to exclude. When a landlord delivers a lease and the key of the premises his tenant receives the *jus possessionis* merely because he has manifested his intent to accept power. "If what the law does is to exclude others from interference with the object," says Mr. Justice Holmes, "it would seem that the intent which the law should require is an intent to exclude others. . . . A tenant for years intends to exclude all persons including the owner until the end of his term. . . . If a bailee intends to exclude strangers to the title, it is enough for possession under the law, although he is perfectly ready to give the thing up to its owner at any moment."[1] The actual intent of a tenant for years or bailee to exclude is technically a fact of no consequence. No doubt devisees, lessees, and bailees generally do intend to exclude other people, and the fact that they do is a reason for giving them legal possession, but it is

[1] Holmes, Common Law 220, 221.

not a technical condition of their possession. The fact that the average lessee intends to exclude other people is a reason for giving lessees legal possession, but a lessee's actual intent to exclude is not one of the facts of which his legal possession is the consequence.

So as to power of dealing with the thing. Inability to deal with a thing is a reason for not giving legal possession of it, just as inability to use any gift is a reason for withholding it. But the fact that power of dealing with the thing is always a reason for giving legal possession does not make it always a condition of legal possession. Sometimes it is. Rules as to possession of wild animals, for instance, make it necessary to capture them. But the possession of an heir or grantee is not technically dependent on his power of dealing with the land. It was once, when entry was necessary to possession, but is not now.

IV. *Possession of Rights and Adverse Possession.*

Habitual submission is the *de facto* basis of legal rights generally. As the Declaration of Independence puts it, "Governments derive their *just* powers from the consent of the governed." A right exists where obedience to will is ordained, and the right consists in the power given the will by such ordinance. Austin says, "The party towards whom one is commanded by the sovereign to do or forbear is said to have a right to the acts or forbearances in question."[1] But, according to this definition, a sentenced murderer has a right to be hanged. Right is power. Legal right, Mr. Justice Holmes says, is the "power of removing or enforcing" legal limitations on conduct.[2] And the Germans define right, without reference to positive law, as "power of willing."[3] A legal right is power conferred by law, a moral right, power conferred by the moral sentiment of one's fellows, and right of either sort is power bestowed, not power *ex propriis*. It is "power not ourselves which makes for righteousness," according to Matthew Arnold, and it is power not ourselves which makes for right. A man therefore has not a right merely because his will is obeyed. But habitual submission begets a moral duty to submit, a duty giving moral right to the dominant will, and therefore constitutes a *de facto* basis for legal right. The habitual conformity of a tribe of savages

[1] Austin, Jurisprudence 407.
[2] Holmes, Common Law 220.
[3] Four German Jurists, 10 Pol. Sci. Quart. 685.

to a *modus vivendi*, the habitual observance of the customs of a whale-fishery, are sources of moral and legal right, and habitual submission to the will of an individual has the same consequences. "*Patientia servitutium inducet officium praetoris*," says the Digest.[1] And the proposition is true of "servitude" in its untechnical sense. The patient servant of another's will shall find the judge on the side of his master. "It's a bad thing to *change*." So say the Protestants of the Cevennes, according to Robert Louis Stevenson, with reference to Catholics who turn Protestants. And he adds, "I have some difficulty in imagining a better philosophy."

I have no right to a man's obedience merely because he is obeying me. Nevertheless, according to the Germans, I am "possessing" a right to his obedience,[2] — a puzzling proposition. But, as Carlyle says of the German definition of a poet, "if well meditated, some meaning will gradually be found in it." When in common parlance we say a man possesses a right we mean he has it. We use the term "possess" merely to express the relation of subject and attribute, as when Hallam says, "The fragments of these lays seem to possess a sort of charm that has evaporated in translation." To "possess" a right, when we have none, is to be requiring and receiving what obedience to the right would give us if we did have it. I "possess" a right to rent, if I am actually demanding and receiving rent, whether I have any right to rent or not. A *de facto* sovereign or office-holder who is actually receiving the obedience due his office "possesses" a right to such obedience whether he has any right to it or not. The Canon Law, according to Savigny, gave significance to the "possession" of every possible right.[3] Whoever, for instance, received interest for his capital was said to have acquired "possession" of the right to the capital and the future interest.

"Possessing" a right is a fact of legal significance, or what the Germans call a "juridical" or "juristic" fact, because of the moral and consequent legal effect of long submission to will. One of the German philosophical jurists asks whether a physician can "possess" a right to be employed by a patient.[4] Savigny says such a "possession" would be an "empty abstraction." "Enjoyment may be conceived as to every right," he says, "but not a

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[1] Digest viii. 3, De servitutibus praediorum rusticorum, 1, 2.

[2] See Holmes, Common Law 238, 340, and Perry, Savigny on Possession 133.

[3] Perry, Savigny on Possession, 391–395.

[4] See Perry, Savigny on Possession 133. and Holmes, Common Law 238 n.

forcible disturbance or usucaption, and yet these are the only conditions under which the exercise of a right is looked upon as a juridical relation."[1] It is quite possible, however, to conceive a physician acquiring by usucaption (or prescription) a right to be employed by a patient. If we should see A employing B as his physician, and, in so doing, submitting for a period of time to B's will, and A in consequence finally bound to employ B as his physician, we should observe a recurrence merely of no uncommon phenomenon. According to Mr. Justice Holmes, a parson was sometimes bound by custom to keep a bull and a boar for the use of his parish,[2] and custom might, with equal justice, bind his parishioners to use his bull and his boar. The two customs would naturally co-exist.

I "possess" a right while I am acquiring an easement in the land of another by adverse use. Continuous and unresisting submission to my will gives me the right. Servitudes, the Digest says, are established "*per patientiam*, as when one suffers water to be carried through his house by a pipe."[3] So long as I am manifesting my will to use a way and not to be hindered in my use thereof and the owner quietly submits, I am in the way of establishing my right. But if the owner, to prevent my passage, places a barrier, and the next time I have occasion to pass I am obliged to remove it, his act of opposition prevents diminution of his right of ownership by my dominion. As Cowen, J., says, there must be "peaceable possession without the hindrance of the owner."[4] "The presumption of a grant," says Kent, C., "is the foundation of title by prescription."[5] That is to say, the attitude of the owner must be that of one who has granted the right.

An easement is a right. But to "possess" an easement when the right does not exist, is not, I think, the same thing, in common parlance, as to "possess" a right. When we speak of possessing an easement in course of acquisition, we generally have in mind, not a continuance of dominion and submission, but a continuing exercise of a certain power we have of dealing with the land consequent on such continuance of dominion and submission. And we attribute a prescriptive right to the continuing exercise of power

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[1] Perry, Savigny on Possession 133.
[2] Holmes, Common Law 392.
[3] Digest vi. 2, De publiciana in rem actione 11, 1.
[4] Colvin *v.* Burnet, 17 Wend. (N. Y.) 564, 568.
[5] 3 Kent, 12th ed., 441.

of dealing with the land under cover of unresisted dominion. Bracton says that what gives prescriptive right is "*possessio per longam, continuam et pacificam usum . . . per patientiam veri domini.*"[1] Nevertheless the real "juridical" fact is not the exercise of power consequent on the relation of dominion and submission but the relation itself, and the term "possession" therefore comes to denote such relation with reference to other rights, if not with reference to easements.

Suppose a man, by virtue of an act of appropriation or some other happening, to have possession of a thing *ex consensu* and, in consequence, legal possession, — a legal power of excluding the generality from dealing with the thing. He may, nevertheless, stand in peculiar relations to individuals, — to an owner for instance. If I appropriate a man's house and lock him out, the generality of my fellows may be morally bound to leave me alone. But the owner may remain morally and legally free to re-enter the house and deal with it to the extent of his ability. Or, if that is legally prohibited, the law may promise him legal possession upon suit brought and proof of his case. On the other hand the owner, although morally and legally free to re-enter, or promised reinstatement by the arm of the law if he asks for it, may nevertheless be submitting to the will of the possessor to keep him out and doing nothing. In such a case the relation of dominion and submission styled "possession of a right" reappears, and its continuance operates as in other cases to give right to the dominant will and perfect the moral and legal possession already bestowed upon it.

"The distinction between property and possession," says Sir Henry Maine, "is the distinction between the legal right to act upon a thing and the physical power to do so."[2] And when we speak of the acquisition of title by long possession or adverse possession we no doubt have in mind, not a mere relation of dominance and submission, but a continuous exercise of a power of dealing with the thing consequent on continuing dominion. When we acquire property in this fashion we "take by use" according to the Romans. Nevertheless the significant fact is the relation of dominance and submission existing with reference to the person whose right is to be affected, a relation evidenced by the fact of

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[1] Sargent *v.* Ballard, 9 Pick. (Mass.) 251, 254.

[2] Ancient Law, 3d Am. ed., 281.

undisturbed enjoyment. Dominance and submission may continue without use. Whether a man is able to deal with a thing himself or not, he can continue to warn off others. A ranchman may lose his steers, but his brand will continue to express his will.

The owner's submission to an appropriator of anything belonging to him must be unresisting to furnish a basis of title. "Possession has a double basis," says the Code, "a basis in law and a basis in fact, and each has its legal effect when confirmed by the habitual silence (*silentio ac taciturnitate*) of all adversaries. One cannot be considered to possess during litigation, because although he holds the thing, the pendency of a legal contest makes him uncertain as to the legal basis of his possession." [1] That is to say, if my adversary is contending with me or manifesting opposition either in or out of court, I am not enjoying the quiet submission to my will necessary to the acquisition of property. "*Transferuntur dominia*," says Bracton, "*sine titulo et traditione per usucaptionem, scilicet per longam continuam et pacificam possessionem.*" [2] And the French Code enacts that "in order to be able to prescribe," that is, as we would say, to take title to a thing by adverse possession, "there is required possession, continual and uninterrupted, *peaceable*, public, unequivocal and under the title of proprietor." [3]

Rather a close distinction is to be noted here between *acquiescence* and *leave* or *favor*. If a man is occupying land or using a way across it because the owner gives him leave, his possession is not adverse, — he is not taking by use. The owner is not submitting to him. He is acting under the owner's leave and favor. In Collins *v.* Collins,[4] for instance, there was held to have been no adverse possession because the possession was "permissive." On the other hand, Putnam, J., in Sargent *v.* Ballard,[5] says, "The occupation [giving prescriptive right] must be with the knowledge and permission of the owner." [6] To suffer, without protest, is, in a sense, to permit. But the distinction is between *sufferance* and *favor*, between *patientia* and *gratia*, and it may not be easy to see, in an actual case, which relation exists.

"This tribune dared to decree," says Cicero, "that whatever any one had possessed from the time of Marius and Carbo he should hold by a perfect title." The word "possess" as here used

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[1] Code 7, 32, 10.
[2] Co. Litt. 113 b.
[3] Code Napoleon, art. 2229.
[4] 90 N. W. Rep. 364 (Minn.).
[5] 9 Pick. (Mass.) 251.
[6] p. 254.

no doubt imports power of dealing with. The decree referred to provided that the continuing exercise during the period specified of the power of dealing with the *res* due to the dominion of the holder of the land over his adversaries should give the right of property. Now this power of dealing with a thing is commonly referred to as physical power. Sir Henry Maine has already been quoted as defining possession to be a physical power of dealing with. But an appropriator's power of dealing with a thing is not only physical power but moral power. His appropriation gives him, as against the generality, possession *ex consensu*. And he has a power of dealing with the thing due not only to the submission of his adversaries, but to a moral consensus on the part of his fellows generally. We may think of his legal possession against his fellows as the consequence of his power of dealing with the thing, and if we ignore his moral power we may deem it a consequence merely of his physical power of dealing with the thing. But the real basis for his legal possession against his fellows generally is not his power of dealing with the thing, physical or moral, but such moral consensus. If the common conscience ordained a general respect to his will, his title or "natural right" to legal possession would not be affected by the fact that he had neither will nor power to deal with the thing itself.

The ordinary case, therefore, of a possessor without title displays this *de facto* basis, — possession *ex consensu* as against the generality and a continuing dominion and submission with respect to adversaries. And with this *de facto* basis we may build our legal structure in various ways. We may give the possessor *ex consensu* legal possession as against every one but the owner forthwith. We may give him legal possession as against no one until long dominion has given him a moral right as against the owner. Or we may give him legal possession against every one, including the owner, forthwith (leaving open to the owner only the *via legis*) and give to his long dominion the effect of finally extinguishing the owner's right of action. Our law (barring its prohibitions of *vis armata*) leaves the owner free to take and deal with his own.[1] The Roman law barred the *via facti* against him.[2] Our law, and the Roman law as well, give an appropriator legal possession of land owned by another. He might be denied protec-

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[1] Holmes, Common Law 210.

[2] Perry, Savigny on Possession 304, 313, 328, 336, 343, 345.

tion of any sort before extinguishment of the owner's right, just as a person acquiring by prescription a right of way has (with us at least) no protection against hindrance of his use by any one until the right has been acquired.[1] "A way, until it becomes a right of way," says Mr. Justice Holmes, "is just as little susceptible of being held by a possessor's title, as a contract."[2] In Northern Pacific R. R. Co. *v.* Lewis,[3] the court held a trespasser had no possession of timber which he had cut in government forests and stored on government lands. It does not follow, necessarily, from this decision that the trespasser could not get title by a continuous and undisputed assertion of dominion. If B built a fence around A's field and proceeded to raise crops, everybody might remain perfectly free, as against B, to tear down the fence and root up the crops. And yet if B continued to maintain the fence and raise crops, and A did nothing, B might in time acquire a legal right to exclude A and everybody else.

Albert S. Thayer.

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[1] Holmes, Common Law 241, 354.

[2] *Ibid.* 354.

[3] 162 U. S. 366.